



**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

**GULF RESTORATION NETWORK,
ET AL**

CIVIL ACTION

VERSUS

NO: 18-1632

**U.S. ENVIRONMENTAL
PROTECTION AGENCY, ET AL**

SECTION: "S" (5)

ORDER AND REASONS

IT IS HEREBY ORDERED that defendants' **Motion for Voluntary Remand Without Vacatur** (Rec. Doc. 46) is **granted in part**;

IT IS FURTHER ORDERED that plaintiff's **Motion for Partial Summary Judgment** (Rec. Doc. 47) is **denied as moot**.

Before the court are two motions, defendants' Motion for Voluntary Remand Without Vacatur, and Plaintiff's Motion for Partial Summary Judgment. Having reviewed the record, the memoranda of counsel, and applicable law, the court finds that the parties are in agreement that remand is inevitable; the only question is whether the remand should be voluntary as requested by defendants, or subsequent to a finding that EPA is violation of section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), as requested by plaintiffs, and whether the remand should be with or without vacatur.

A more detailed recitation of background facts has been set forth by the court in its prior Order and Reasons (Rec. Doc.33), and is incorporated by reference. For purposes of the instant motions, the crucial fact is that the parties actually differ on very little: the EPA acknowledges

that is in violation of section 7(a)(2) of the Endangered Species Act ("ESA"), and that remand and reconsideration at the agency level is necessary. In support of their motion, EPA submitted the affidavit of Louisiana Department of Environmental Quality ("LDEQ") Secretary Chuck Carr Brown, who has averred that the lowered dissolved oxygen "DO" standard challenged by plaintiffs is currently incorporated in one Louisiana Pollutant Discharge Elimination System permit, and that if the matter is remanded, the LDEQ would forego incorporating the lowered DO standard into any further permits during the remand period. Thus, in essence, the EPA has consented to a partial vacatur. Moreover, plaintiffs do not appear to take issue with the new sub-segment boundaries, except to the extent they incorporate the lowered DO standard, suggesting that not vacating the new sub-segment boundaries is acceptable to them.

Absent a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions. Macktal v. Chao, 286 F.3d 822, 825–26 (5th Cir. 2002); see also, Frito-Lay, Inc. v. U.S. Dep't of Labor, 20 F. Supp. 3d 548, 552 (N.D. Tex. 2014). Even in the absence of new evidence or an intervening event . . . courts retain the discretion to remand an agency decision when an agency has raised "substantial and legitimate" concerns in support of remand. Carpenters Indus. Council v. Salazar, 734 F. Supp. 2d 126, 132 (D.D.C. 2010). Granting voluntary remand in such cases preserves scarce judicial resources by allowing agencies "to cure their own mistakes." Id. (citing Ethyl Corp. v. Browner, 989 F.2d 522, 524 (D. C. Cir.1993)).

Considering that they have acknowledged that they failed to follow the requirements of section 702(a), the court finds that defendants have raised substantial and legitimate concerns in support of remand. As for vacatur, because (with the exception of the DO standard related to one

permit) there is essential agreement between the parties, a partial vacatur is appropriate.


Accordingly,

IT IS ORDERED that defendants' Motion for Voluntary Remand Without Vacatur (Rec. Doc. 46) is granted in part, and this matter is hereby **REMANDED** to the agency for further proceedings consistent with this order.

IT IS FURTHER ORDERED that the remand is made subject to a **PARTIAL VACATUR**, vacating the new DO standard except in connection with the one permit in which it has been incorporated, and maintaining the new water body boundaries, pending reconsideration on remand;

IT IS FURTHER ORDERED that plaintiff's Motion for Partial Summary Judgment (Rec. Doc. 47) is denied as moot.

New Orleans, Louisiana, this 25th day of February, 2019.


MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE

April 26, 2016	EPA receives email response from LDEQ to inquiry seeking clarification on WQ091 data
May 10, 2016	LDEQ/EPA collaborative call to clarify details of WQ091 and establish estimated timeline for action

Summary of Revisions to WQ091

The Dissolved Oxygen Criteria Revisions for eLMRAP Ecoregion (LAC 33IX.1123)(WQ091) revised the DO criteria for 31 inland streams to 2.3 mg/L for the months of March through November; for the months of December through February the DO criteria for inland streams will remain as 5.0 mg/L (inland areas) or 4.0 mg/L (for estuarine areas). This revision was based on findings from a use attainability analysis of inland rivers and streams in the eLMRAP ecoregion. In addition, boundaries for 42 subsegments within the eastern eLMRAP, the southern plains terrace, and flatwoods, the terrace uplands, and the coastal deltaic marshes ecoregions are being refined based on watersheds; these boundary refinements resulted in the delineation of 21 new subsegments.

The DO criteria revisions were derived using an ecoregion approach and are the result of findings presented in a June 7, 2013, report entitled *Use Attainability Analysis (UAA) of Inland Rivers and Streams in the Eastern Lower Mississippi River Alluvial Plains Ecoregion for Review of Dissolved Oxygen Water Quality Criteria*. The UAA demonstrated that the DO criteria established for streams in the western portion of the LMRAP as a result of the earlier Barataria-Terrebonne UAA are also appropriate for the eastern portion of the LMRAP. EPA had no significant points of concern for the UAA, as stated in the November 25, 2013 letter to LDEQ

II. New or Revised Provisions EPA is Approving

EPA is approving DO criteria revisions for all 31 watershed subsegments, listed here: 040201, 040303, 040305, 040306, 040401, 040402, 040403, 040404, 040503, 040506, 040508, 040601, 040604, 040605, 040606, 040702, 040705, 040809, 040907, 040915, 040916, 040917, 041101, 041201, 041202, 040807, 040808, 040903, 040912, 040913, and 040914. Discussion of approval rationale is found below.